IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.705 OF 2006

Smt.Seema Suresh Dawalbhakta
Age-55 years, Occ. Housewife,
R/at. "Savitri Smriti", Datta Mandir Road,
Wakola Police Line, Santacruz (E),
Mumbai-400055. .. **Appellant**

Versus

M/s.Sunil Somvanshi & Company
A Proprietary Concern,
Through its Proprietor,
Shri Sunil Laxman Somvanshi,
Age : 37 years, Occ. : Business,
Presently working at,
6, "Pratapgad", Opp.Marathwada Sadan,
Deccan Gymkhana, Pune-411004. ... **Respondent**

Shri Shriram S. Kulkarni, learned Advocate for the Appellant
Shri Shirish V. Pitre, learned Advocate for the Respondent

CORAM : S.R. SATHE,J.
DATED : 22/10/2007

ORDER ORDER :-

1. Heard both the learned Advocates at length.

2. Appeal is heard finally at admission stage.

3. The only point which falls for consideration in this appeal is whether in a case where the Plaintiff

has failed to comply with any order to answer interrogatory or for discovery or for inspection of documents and the defendant has made an application for dismissal of the suit for non-compliance of the order of the Court, the Court is under an obligation to dismiss the suit.

4. The brief facts giving rise to this issue and the present appeal are as under :-

The suit property described in detail in paragraph-1 of the plaint is owned by the defendants. She executed on 11/12/1997 two development agreements thereby assigning development rights in respect of the suit property in favour of Plaintiff. As per the said agreements, consideration of the said assignment plaintiff agreed to pay Rs.25 lakhs to the defendant and accordingly, paid Rs.3 lakhs at the time of execution of the agreement and Rs.4 lakhs thereafter. The balance amount was decided to be paid by installments as mentioned in the agreement. The defendant also executed two power of attorneys in favour of Plaintiff to carry out the development activities on the suit property and the same were duly

registered. According to Plaintiff, it was specifically mentioned in clause-11 of the agreement that in case any dispute regarding the title of the owner arises then the owner would settle the same at his own costs and risk and the developer then in that event will get time relaxation for payment of installment.

5. It is Plaintiff's case that subsequently, he came to know that there was encroachment on the suit property. Besides this, the defendant had already entered into an agreement with third party for development of the suit property. The Plaintiff negotiated with the person with whom the defendant had made an agreement and he could obtain possession of one suit property in September-1998. The Plaintiff also informed the defendant about the expenses and loss suffered by him in negotiating with the third person and securing possession. When Plaintiff started development of the suit property and booking flats, the defendant issued notice dated 27/03/2001 informing Plaintiff that the development agreement and power of attorney are cancelled by him. The defendant also published notice to that effect in daily newspaper.

According to Plaintiff, he had in fact paid the amount over and above the installment and no amount was in fact due to the defendant. However, in view of the said notice issued by the defendant, Plaintiff filed suit for declaration that the development agreement dated 11/12/1997 in respect of the suit property is in subsistence so also power of attorney executed by the defendant in favour of Plaintiff and prayed for permanent injunction restraining defendant from obstructing Plaintiff's possession and activities of development of the suit property.

6. On 15/07/2005, the defendant filed an application under Order-11, Rule-12 of the Code of Civil Procedure (hereinafter referred to as CPC) and submitted that she has filed written statement and specifically pleaded that her title to the suit property was clear from the date of agreement i.e. from 11/12/1997 and the Plaintiff has in fact committed breach of contract. It was further alleged that the very fact that Plaintiff started development of the property after getting necessary plans sanctioned from Pimpri-Chinchwad Municipal Corporation and also started

booking flats was sufficient to show that the defendant's title was clear and Plaintiff was also aware of the said position. The defendant further submitted in the application that to resolve the real controversy between the parties, it is necessary to have on record certain documents which are in possession and custody of the Plaintiff. The defendant, therefore, gave list of 19 documents and prayed that the Plaintiff be directed to make discovery on oath of all the original said documents.

7. On the above mentioned application after hearing both the parties the learned Trial Judge passed the following order on 20/09/2005.

> ***"Heard both the learned Advocates at length. Plaintiff is directed to make discovery on oath about the document mentioned in this application and to produce these documents."***

8. On 04/04/2006, the Plaintiff filed an application and prayed that time be granted to the Plaintiff for complying the order dated 20/09/2005. After hearing both the advocates, learned Trial Judge

passed following order :-

> ***"Heard both the learned Advocates at length. The Plaintiff is ready to comply the order passed below Exh-31. The time granted till 10/04/2006 as last chance subject to costs of Rs.50/-"***

9. In the mean time, on 21/03/2006, the defendant had filed an application under Order-11, Rule-21 and Order-39, Rule-11 of CPC and prayed that as Plaintiff has failed to comply the order passed by the Court below application filed under Order-11, Rule-12 of CPC, Plaintiff's suit be dismissed as per Order-11, Rule-21 and Order-39, Rule-11 of CPC. After hearing the arguments of both the learned Advocates, the learned Trial Judge found that though defendant had submitted interrogatories, Plaintiffs in his say has raised objection regarding relevancy of some of the interrogatories and so far as an application Exh-31 regarding production of documents is concerned, he had undertaken to produce the same and give inspection subject to availability of the same. After considering the relevant legal position the learned Trial Judge dismissed the Plaintiff's application filed under Order-11, Rule-21 and Order-39, Rule-11 of CPC.

10. Being aggrieved by the above mentioned order the defendant has filed the present appeal. In this appeal before me, Shri Sriram S. Kulkarni, learned Advocate for the Appellant-original defendant has urged only two points. Firstly, he submitted that having once directed Plaintiff to produce the document there was no necessity for the learned Trial Judge to find out whether those documents were necessary or whether the interrogatories submitted by the defendants were necessary and relevant. All that was necessary according to him, was to find out whether the Plaintiff had complied order dated 20/09/2005. Secondly, he canvassed before me that the 'word' used under Order-11, Rule-21 of CPC is "shall" and as such it was mandatory for the Court to dismiss the Plaintiff's suit. Having once found that the Order dated 20/09/2005 was not complied and there was no scope of using any discretion by the Court in that behalf. He, therefore, submitted that the appeal be allowed and the order passed by the learned Trial Judge below Exh-61 be set aside, the Plaintiff's suit be dismissed as per the provisions of the Order-11, Rule-21 of CPC. As against

this, Shri S.V. Pitre, learned Advocate for the Plaintiff supported the order passed by the learned Trial Judge. He submitted that the Court was not under obligation to dismiss the suit, merely because order dated 20/09/2005 was not complied and the discretion used by the learned Trial Judge is legal and correct. He, therefore, submitted that the appeal be dismissed.

11. From the perusal of the record, it is clear that defendant had submitted an application under Order-21, Rule-11 and 12 of CPC and the Trial Court had directed the Plaintiff to make discovery on oath about the documents mentioned in the application and produced the said document. It is also very clear that ultimately, the Plaintiff did not comply the said order and it seems that he filed the detail say giving reason as to why he could not comply the said order. From the perusal of the order passed by the Trial Court below Exh-61 and below Exh-47 according to the Trial Court some of the interrogatories were not relevant and there was no necessity to dismiss the suit merely because Plaintiff had failed to produce the documents. Shri Sriram S. Kulkarni, learned Advocate for the Appellant-

defendant strenuously argued before me that once the order passed by the Trial Court was not complied by the Plaintiff there was no other alternative but to dismiss the Plaintiff's suit. When the defendant made specific application in that behalf as per Order-11, Rule-21 of CPC according to him, the said provision is mandatory because word used in the said provision is "Shall". He also submitted that when in Rule-21, Penal provision namely dismissal of suit is provided it has to be construed as mandatory provision. In order to substantiate this proposition, he has placed reliance on a case **Jagan Nath V/s. Jaswant Singh AIR 1954 S.C. 210** wherein the Apex Court has held that the provisions of statute is not mandatory unless non compliance with it is made penal. The learned Advocate has also drawn my attention to a case **Khub Chand and others V/s. State of Rajasthan and others AIR 1967 Supreme Court 1074** wherein the Apex Court has made following observations:-

> ***"Though term 'shall' is construed as 'may' under certain circumstances in its ordinary significance, term is mandatory - Same shall be interpreted as mandatory unless such interpretation leads to some***

> ***absurd or inconvenient consequence or be at variance with intent of legislature, to be collected from other parts of the Act."***

12. Besides this, the learned Advocate for the defendant has laid his hands on a case **Ramchandra Keshav Adke V/s. Govind Joti Chavare and others 1975 Maharashtra Law Journal 515** wherein the Apex Court has observed :-

> **"Court must ascertain intention from review of language, subject-matter and importance of provision in relation to general object intended to be secured, mischief intended to be suppressed and remedy to be promoted by Act - No universal rule can be laid down as to whether enactment shall be considered directory only or obligatory with implied nullification for disobedience."**

13. The propositions in the above mentioned rulings are not disputed and can not be disputed. However, the facts of the above mentioned rulings and facts of the present case are quite different and as such the above cited rulings are of no use to the present Appellant/defendant.

14. In order to find out whether in every case of non-compliance of the order passed under Order-11, Rule-12 of CPC the Court must take action under Order-11, Rule-21. It would be necessary to see relevant provisions. It runs as follows :-

> ***"Rule 12. Application for discovery of documents - Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit:***
>
> ***Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."***

> ***"Rule 21. Non-compliance with order for discovery :-{(1)} Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the***

Court for an order to that effect, and {an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard,}
{(2) Where an order is made under sub-rule (1) dismissing any suit, the Plaintiff shall be precluded from bringing a fresh suit on the same cause of action}"

15. The object of Order-11, Rule-12 is to illicit admission from the opposite parties that may obviate the necessity to produce lengthy evidence and expedite the disposal. So, while determining the effect of non-compliance of the order we have to bear in mind the object with which such order is passed or direction is given by the Court. Moreover, if we see the language of Order-11, Rule-21 it only shows that party not complying the order of the Court passed under Order-11, Rule-12 shall invite liability to have his suit dismissed but that does not mean that in each and every case of such nature the Court must dismiss the suit. On the contrary, the section clearly says that non-compliance of the order will put the party in default, under liability. The other side may move the Court to pass necessary order in view of the liability incurred by the party in default, but there is nothing in the

Section which says that under such circumstances, the Court "shall" pass the order of dismissing the suit. On the contrary, it indicates that even in such a case Court may pass necessary order under Order-11, Rule-21 of CPC. In fact in a case **Allahabad Bank V/s. Ganpat Rai AIR 1921 Lahore 750**. It has been held that stringent provision of Order-11, Rule-21 of CPC should be complied only in extreme cases. That obviously means that while passing stringent order of dismissal of suit or striking of defence, the Court is to take into consideration all the facts and circumstances of the case and decide whether the same warrant order under the said provision. If really the intention of the legislature would have been to the effect that if the order of the Court is not complied with the Court shall dismiss the suit or strike of the defence as the case may be, then the legislature would have used such strict plain language but that has not happened. The peculiar language used in Order-11, Rule-21 shows that it is not mandatory for the Court to dismiss the suit or strike of defence, the moment Court finds that particular order passed by the Court is not complied

with.

16. In fact in a case **Babar Sewing Machine V/s. Triloknath AIR 1978 SUPREME COURT 1436.** Their Lordships of the Supreme Court have specifically observed that mere failure of a party to comply with the order to answer interrogatories will not enable the Court to have the suit dismissed or the defence struck off. There has to be obstinacy or contumacy on the part of the opposite party or willful attempt to disregard the order of the Court to answer interrogatories. In the instant case, we find that the Plaintiff had in fact shown his willingness to produce the document subject to the availability. There is nothing on record to show that the Plaintiff failed to comply the order dated 20/09/2005 with a view to disregard the order. So, there is absolutely no element or obstinacy or contumacy as observed by the Apex Court. So, under such circumstances, the Court was not in error of law in rejecting defendant's application under Order-11, Rule-21 of CPC. Shri Pitre, learned Advocate for the Plaintiff has drawn my attention to a case **Feroze Homi**

Duggan V/s. Benzer Interiors Private Ltd. 2006 (2) Maharashtra Law Journal,289 wherein also this Court (D.G. Karnik, J.) relying on the above mentioned observations of the Supreme Court has observed that even where the breach of an order of the Court or breach of undertaking is proved to have been committed by the defendant the Court may strike of the defence of the defendant only if it is satisfied that the conduct of the defendant is obstinate or contumacious or amounts to willful disregard to the order of the Court. Another authority to which the learned Advocate for the Plaintiff has made reference is **Ramavatar Surajmal Modi V/s. Mulchand Surajmal Modi The Maharashtra Law Journal 2004 (2) Page-1,** wherein the Division Bench of this Court has held that power of dismissal of suit or striking out defence under the provisions of Order-39, Rule-11 of CPC should be exercised where the default is willful and conduct of the defaulting party is contumacious resulting in serious prejudice to the opposite party.

17. Shri Sriram Kulkarni, learned Advocate for the

defendant tried to argue before me that the provisions of Order-11, Rule-21 and Order-39, Rule-11 operate in different fields. According to him, the provisions of Order-11, Rule-21 is mandatory while the provisions under Order-39, Rule-11 is discretionary or directory. However, we can not ignore the fact that in the instant case the defendant himself has titled his application as application under Order-11, Rule-21 and Order-39, Rule-11. So, I have absolutely no hesitation to hold that there is nothing in Order-11, Rule-21 of CPC as a result of which it can be said that in each and every case where Plaintiff has failed to comply order passed by the Court passed under Order-11, Rule-21, the Court must dismiss the Plaintiff's suit.

18. At the costs of repetition, I must mention that in the instant case, there is absolutely nothing on record to indicate that the Plaintiff has willfully disobeyed the order passed under Order-11, Rule-12 of CPC. We can not ignore the fact that this is also not a case where Plaintiff has based his suit on a particular document or documents and the very document or documents have not been filed by the Plaintiff, though

order to that effect was passed by the Court. So, if at all the Plaintiff has failed to file particular document even after issuing notice to him in that behalf by the defendant or by direction given by the Court, then defendant may argue that adverse inference may be drawn against the Plaintiff in respect of the said document. But in any case, I am not of the view that the order passed by the Trial Court is illegal or incorrect. It is needless to say that it is well settled that while considering any interim order passed by the Trial Court, the Appellate Court should not interfere with the same unless the said order is arbitrary or capricious or is against the provisions of law and is not borne out from the material on record.

In this view of the matter, there is no substance in this appeal.

Appeal is dismissed.

Parties to bear their own costs of this appeal.

(S.R.SATHE,J.)